Supreme Court, U. S.
FILED
AUG 1 1979

No. 78-1816

In the Supreme Court of the United States

OCTOBER TERM, 1978

MILTON PARNESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 8a-9a) and of the district court (Pet. App. 1a-7a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1979. A petition for rehearing was denied on March 6, 1979. The petition for a writ of certiorari was filed on June 4, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner established that the government suppressed exculpatory evidence, thereby necessitating a vacation of his sentence under 28 U.S.C. 2255.

STATEMENT

1. In October 1973, following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of causing interstate transportation of stolen property, in violation of 18 U.S.C. 2314, on one count of causing interstate travel in furtherance of a scheme to defraud, in violation of 18 U.S.C. 2314, and on one count of acquiring an enterprise affecting interstate or foreign commerce through a pattern of racketeering, in violation of 18 U.S.C. 1962(b). He was sentenced to concurrent ten-year terms of imprisonment on each count and fines amounting to $55,000. The court of appeals affirmed (503 F. 2d 430), and this Court denied certiorari (419 U.S. 1105).

The evidence presented at trial is described in detail in the opinion of the court of appeals on direct appeal from petitioner's conviction (503 F. 2d at 433-435). Briefly, the evidence showed that petitioner defrauded Allan Goberman of his controlling stock interest in the St. Maarten Isle Hotel Corporation, a gambling casino and hotel complex in the Netherlands Antilles. Petitioner was retained by Goberman to collect substantial sums of money owed by tourists and gamblers on junkets to the casino. Instead of remitting money that he collected on behalf of Goberman, however, petitioner diverted that money for his own use. When Goberman suffered financial difficulties in late 1970, petitioner lent him $160,000, a loan made up of money that petitioner previously had converted. Goberman pledged his entire interest in the casino in return for the loan. Thereafter, by continuing to divert or withhold receipts belonging to the casino, petitioner effectively prevented Goberman from obtaining the funds needed to make repayment. Petitioner thereafter foreclosed on the pledged stock and assumed control of the casino.

Following his conviction, petitioner moved for a new trial on the basis of newly discovered evidence purportedly uncovered during a civil suit brought against Goberman. The motion was denied by the district court (408 F. Supp. 440). The court of appeals affirmed that denial in January 1976 (536 F. 2d 474).

In May 1978, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255, claiming that the government had suppressed exculpatory evidence that he later discovered during the civil litigation. The district court held an evidentiary hearing to determine whether the evidence in question had been made available to the defense. At the conclusion of that hearing, the court denied petitioner's motion, finding that petitioner had failed to establish that the documents in question were not given to the defense prior to trial. The court also found that the documents were discussed in considerable detail in certain tape recordings that admittedly were given to petitioner prior to the commencement of trial (Pet. App. 7a n.6). The court of appeals affirmed (Pet. App. 8a-9a).

ARGUMENT

Petitioner argues (Pet. 11-14) that his conviction must be vacated because the government withheld exculpatory evidence. The record establishes, however, that the evidence was made available to petitioner prior to trial. Moreover, there is no basis for the assertion that the evidence proves his innocence.

1. At the conclusion of the hearing on petitioner's motion to vacate his sentence, the district court credited the testimony of the government witnesses that petitioner's attorneys had been afforded "open file" discovery prior to trial and that one of his attorneys had inspected all the government documents relating to the

case (Tr. 39, 80, 97, 101).[1] The government also proved, through evidence establishing continuous chain of custody, that the documents in question (Exhibits C-L) were among the materials presented to petitioner's attorneys for pre-trial examination.[2] Having disclosed its entire file to the defense prior to trial, the government more than satisfied the disclosure requirements needed to assure a fair trial. See *United States* v. *Agurs*, 427 U.S. 97, 109 (1976). The district court's factual finding, affirmed by the court of appeals, that the government made "open file" disclosure, including Exhibits C-L, was amply supported by the record, and there is no occasion for further review of that determination. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

In addition to opening its files to petitioner prior to trial, the government also tendered certain tape recordings in which Goberman referred to and discussed the content of Exhibits C-L. Those tapes not only served to alert petitioner and his counsel to the existence of the documents, but also disclosed much of their substance. As the district court noted, a defendant is not deprived of a fair trial when he is aware of the essential facts enabling him to take advantage of exculpatory evidence, all of which is freely available (Pet. App. 7a n.6). See *United States* v. *Craig*, 573 F. 2d 455, 492 (7th Cir. 1977), cert. denied, No. 77-1499 (Oct. 2, 1978); *United States* v. *Brown*, 562 F. 2d 1144, 1151 (9th Cir. 1977); *United States* v. *Erb*, 543 F. 2d 438, 443 (2d Cir.), cert. denied, 429 U.S. 981 (1976).

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[1] "Tr." refers to the transcript of the hearing on petitioner's motion to vacate sentence. "T. Tr." refers to the trial transcript. "J.A." refers to the joint appendix filed in the court of appeals in this case.

[2] The documents in question appear at J.A. 61-89.

2. Despite the fact that he was represented by experienced counsel who inspected the government's entire file prior to trial, and who were given tapes discussing the evidence that petitioner claims was exculpatory, petitioner asserts that his conviction must be set aside because that evidence might have been used to show his innocence. Petitioner argues that the documents in question could have been used to impeach Goberman's testimony that petitioner wrongfully withheld $400,000 from the casino (Pet. 9). However, claims of "newly discovered evidence" bearing on the merits of a case must be raised in a motion for a new trial within two years of the date of conviction (the present Section 2255 motion was filed 4 and 1/2 years after conviction). See Fed. R. Crim. P. 33. The time limit prescribed by Rule 33 may not be exceeded. See *United States* v. *Smith*, 331 U.S. 469 (1947); *United States* v. *Beran*, 546 F. 2d 1316, 1319 n. 1 (8th Cir. 1976), cert. denied, 430 U.S. 916 (1977); *Oddo* v. *United States*, 171 F. 2d 854, 858 (2d Cir. 1949). After that time, any redress that may be just and appropriate on the basis of newly discovered evidence (and in the absence of a showing of a due process violation that would justify collateral relief) must be sought through recourse to the President's power of pardon and commutation. Collateral attack on a lawful sentence is not a substitute for a timely motion for a new trial based on newly discovered evidence.[3]

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[3]Although this Court has approved collateral proceedings to determine "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt" (*Jackson* v. *Virginia*, No. 78-5283 (June 28, 1979), slip op. 10-11), it has never suggested that collateral proceedings are an appropriate vehicle to retry the merits of a criminal case whenever the defense wishes to proffer new evidence. Such a procedure would wholly nullify the time limits prescribed by Fed. R. Crim. P. 33, a result that is particularly inappropriate where the "newly discovered evidence" was available to the defense from the beginning but was passed over through either neglect or tactical choice.

In any event, petitioner's belated contention that Exhibits C-L could have been used to impeach Goberman's testimony and thereby establish his innocence is insubstantial. The government's proof at trial showed that petitioner's loan to Goberman was in fact made up of converted funds wrongfully withheld from Goberman. Goberman testified, subject to extensive cross-examination, that petitioner withheld approximately $400,000 during the period immediately prior to making the loan (T. Tr. 70, 462).[4] Through the testimony of a business associate, the government established that petitioner's income derived almost exclusively from his collections for Goberman (T. Tr. 595, 598-600). Moreover, the evidence showed that petitioner devised and executed an elaborate scheme to conceal the source of the loan, including false bookkeeping entries; he also masked his interest in the foreclosure proceeding that effectively transmitted casino ownership from Goberman to himself (T. Tr. 86-88, 100-102, 118, 703, 811-812, 851, 869-870, 1399, 1405-1411). As the court of appeals observed on direct appeal from petitioner's conviction (503 F. 2d at 437):

> The jury surely was justified in concluding that all [the false representations] were part of [petitioner's] scheme to cover up his coversion of money due Hotel Corp. In short, in the context of this record and in view of the complete absence of any credible explanation as to the source of funds used in connection with the Goberman loan, we fail to see how the jury could have reached any

[4]Goberman's testimony was based on his analysis of gambling debts incurred by casino patrons. He testified that government exhibits 167-177, which were tally sheets of casino winnings and losses, formed part of the basis for his calculation. He also relied on past recollection and tally sheets no longer available (T. Tr. 460-471).

> conclusion except that [petitioner] had withheld marker collections and had used the proceeds of such collections and the front money to acquire Goberman's interest in Hotel Corp.

In his motion for a new trial, petitioner attacked Goberman's trial testimony, contending that the deposition evidence obtained during his civil litigation with Goberman established that Goberman had exaggerated the amount of money that petitioner diverted. On analysis of petitioner's "newly discovered evidence," the district court concluded that the evidence was not newly discovered and did not serve to impeach Goberman's testimony. The district court pointed out that the subject matter of petitioner's "new" evidence had been explored both on direct and cross examination at trial (408 F. Supp. at 443-444).

The substance of petitioner's present collateral attack on his conviction is not materially different from that of his prior motion for a retrial. Once again, he contends that he has discovered new evidence stemming from his civil litigation that shows that Goberman exaggerated the amount that he diverted. He claims that, under a more accurate accounting, the evidence would show that Goberman owes him money rather than the converse.[5] However, the exhibits that petitioner relies on are simply undated scratch sheets, apparently relating to some, but not all, of the debts reflected in the original casino tallies

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[5]In support of this argument, petitioner refers (Pet. 4) to the fact that he ultimately prevailed in the civil action involving Goberman. The suit was originally filed by Goberman against petitioner and petitioner pleaded a counterclaim. Petitioner neglects to explain that the judgment that he obtained in this proceeding was a default judgment. Goberman, who was insolvent and judgment proof (T. Tr. 4), defaulted because he lacked the funds to prosecute the litigation (J. App. 151).

(Gov. Ex. 167-177). Those original tallies, in turn, related to only some of the casino debts that petitioner was authorized to collect.[6] Thus, the documents are not determinative of the total amount owed by petitioner to Goberman, since they do not relate to all of the relevant business dealings between the parties. In sum, contrary to petitioner's contention, the partial computations appearing on the documents in question do not prove that Goberman's testimony was false or that petitioner was innocent of the offenses charged in the indictment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1979

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[6]Some of the original tally sheets were unavailable at trial. Goberman's estimate of petitioner's debt rested on personal recollection and prior computations made with materials no longer available (T. Tr. 464, 470, 548-551). During summation, petitioner's counsel vigorously argued that the jury should not credit Goberman's testimony about the size of the debt because Goberman had not produced all of the supporting documentation (T. Tr. 1618-1619). The jury chose to believe Goberman's testimony, which was supported by the circumstantial evidence discussed on page 6, *supra*.

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